Justice Code

Supreme Court, U. S.
FILED
MAR 14 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951.

No. 653.

LOEW'S INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; RKO RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORP.; UNITED ARTISTS CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION, *Petitioners,*

v.

DAVID E. MILGRAM, SAMUEL MILGRAM, NATHAN MILGRAM, FRANCIS KRET and BESSIE HOBERMAN, Co-Partners Trading as BOULEVARD DRIVE-IN THEATRE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

WM. A. SCHNADER,
BERNARD G. SEGAL,
MORRIS WOLF,
ABRAHAM L. FREEDMAN,
Attorneys for Petitioners.

SCHNADER, HARRISON, SEGAL & LEWIS,
17th Floor, Packard Building,
Philadelphia 2, Pa.,

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor, Packard Building,
Philadelphia 2, Pa.,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT	1
Opinions Below	2
Statement of the Matter Involved	2
Jurisdictional Statement	8
Statutes Involved	8
Questions Presented	9
Reasons Relied Upon for Allowance of the Writ	9

TABLE OF CASES CITED.

	Page
Ball v. Paramount Pictures, Inc., et al., 169 F. (2d) 317 (C. C. A. 3, 1948), cert. den. 339 U. S. 911 (1950)	8, 11, 17
Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F. (2d) 951 (C. C. A. 2, 1951), cert. den. 342 U. S. 926 (C. C. A. 2, 1952)	18
Federal Broadcasting System, Inc. v. American Broadcasting Company, 167 F. (2d) 349 (1948), cert. den. 335 U. S. 821 (1948)	10
Fifth & Walnut v. Loew's Incorporated, 176 F. (2d) 587 (C. C. A. 2, 1949), cert. den. 338 U. S. 894 (1949)	18
United States v. Crescent Amusement Co., 323 U. S. 173 (1944)	9
United States v. Paramount Pictures, Inc., et al., 334 U. S. 131 (1948)	7, 8, 9, 11, 12, 17
Windsor Theatre Company v. Walbrook Amusement Company et al., 189 F. (2d) 797 (C. C. A. 4, 1951)	10

STATUTES CITED.

	Page
Clayton Act (Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. § 15)	2, 6, 8
Revised Rules of The Supreme Court of the United States, Rule 38, Section 5 (b)	10
Judicial Code, Section 1254 (1), 62 Stat. 928 (1948), 28 U. S. C. § 1254 (1)	8
Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. §§ 1, 2)	2, 6, 8, 17

IN THE

Supreme Court of the United States.

October Term, 1951.

No. .

LOEW'S INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; RKO RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORP.; UNITED ARTISTS CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Petitioners,

v.

DAVID E. MILGRAM, SAMUEL MILGRAM, NATHAN MILGRAM, FRANCES KRET AND BESSIE HOBERMAN, Co-PARTNERS TRADING AS BOULEVARD DRIVE-IN THEATRE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Loew's Incorporated, Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation and Warner Bros. Pictures Distributing Corporation, petitioners, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 18, 1951.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 94 F. Supp. 416. The majority opinion of the United States Court of Appeals for the Third Circuit is reported at 192 F. (2d) 579, and the dissenting opinion of Judge Hastie at p. 587.

STATEMENT OF THE MATTER INVOLVED.

This action was brought by the respondents under the Sherman and Clayton Acts (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1, 2; Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. 15). They asked for injunctive relief only.

The respondents, a partnership, own and operate a number of motion picture theatres in Pennsylvania. In 1949, they constructed a neighborhood, part-time, drive-in theatre on the outskirts of Allentown, Pennsylvania (R. 682), which they operated from October 19 to November 27, 1949 (R. 705). During this period they deliberately exhibited selected old pictures (R. 705, 140).

During the early fall of 1949, the respondents had some conversations with local managers of the petitioners, who are distributors of motion picture films (and will hereafter be called "the distributors"), in which they indicated that they would like to have motion picture films on a first-run basis for the 1950 season. None of these conversations was conclusive, and on November 29, 1949, respondents' lawyer addressed identical letters to each of the distributors advising the particular distributor that the new drive-in theatre could accommodate 932 automobiles, was one of the finest drive-in theatres in the Philadelphia Exchange area, was closed for the winter, but would reopen on or about March 15, 1950, and that prior to that

time respondents desired to enter into license agreements to exhibit feature motion pictures on a first-run basis in Allentown, Pennsylvania (Exhibits P-13, P-15, P-17, P-20, P-21, P-22, P-24 and P-25). Actually, the theatre opened on March 31, 1950 (R. 682).

Prior to February 10, 1950, none of the distributors had notified respondents it would license its motion picture films first run to the respondents' drive-in theatre, and on that date suit was begun.

Respondents' drive-in theatre is between Allentown and Bethlehem, Pennsylvania. It is within the city limits of Allentown—2.4 miles from the business center of that city—1.7 miles from the boundary between Allentown and Bethlehem, and less than 5 miles from the business center of Bethlehem (R. 55, 109, 157, 579).

Allentown is the largest city in the Lehigh Valley region. Its shopping center is the hub of a trading area of 350,000 to 400,000 persons, has the finest type department stores and other shops, with railroad, bus and trolley terminals from the entire area converging there (R. 695-697).

In the business center of Allentown, there are six excellent conventional theatres which exhibit pictures on a first-run basis (R. 696). There are four such first-run theatres in Bethlehem, and three in Easton, which is also nearby (R. 697). None of the distributors has any interest whatever—financial or otherwise—in any of these theatres (R. 695). The owners of five of the Allentown conventional theatres intervened as parties defendant.

Unlike the conventional theatres, drive-in theatres in this area are seasonal, are materially affected by weather conditions, operate only after dark, and, of course, have no matinee performances (R. 244, 700). Respondents' theatre does not admit pedestrians (R. 701).

On the other hand, the conventional theatres in Allentown operate the year round, are open from early afternoon until late at night, and are available to all customers.

It is axiomatic in the motion picture business that the theatre at which a picture is exhibited first run is the "show window" for the picture and that the future success of that picture in the surrounding area depends to a large degree on the public's reception of it on first run. Therefore, an unsuccessful exhibition when the picture is shown on first run is almost invariably followed by an unsuccessful subsequent-run record. It is for this reason that the theatre selected as the "show window" for a picture is most frequently one which by virtue of its location in a downtown area attracts the greatest number of persons or reaches them by advertising on its marquee. (See R. 240, 308-309, 332-333, 405-406, 427-430, 461-466, 472-473, 484, 490.)

After suit was brought, respondents submitted to each of three distributors a bid for one specified picture for first-run showing at the new drive-in theatre at a high guaranteed rental; but, as the trial judge found, in each case the picture for which respondents bid had already been licensed for first-run exhibition at one of the conventional theatres in downtown Allentown (R. 706).

Also, after suit was brought, six of the eight distributors licensed pictures to respondents' theatre on a second-run basis (R. 498, 707, 311, 537, 336), which in Allentown means a run twenty-eight days after first run (R. 198-199, 471-472, 698). As for the other two distributors, respondents had never negotiated with United Artists for second run, and Columbia never licensed a picture to respondents' drive-in theatre other than on last run (R. 103, 704-705). Of the six distributors who licensed pictures on second run, two—RKO and Fox—had offered to do so prior to the bringing of suit (R. 705, 706).

Although the respondents in their complaint alleged that the distributors were conspiring to impose unreasonable clearances against respondents, they abandoned that claim at the trial. There can be no question that, as the case was presented to the court, it involved only an alleged conspiracy to deny first run to the respondents' drive-in theatre (R. 210-215); and the trial court specifically declined to find any conspiracy in respect to clearances (R. 688).

The case was tried before Chief Judge Kirkpatrick of the United States District Court for the Eastern District of Pennsylvania.

The branch manager of each of the distributors was called by the respondents as on cross-examination (R. 207-500) and testified that his company had determined not to license its pictures for first run to the respondent's drive-in theatre in Allentown, but rather to continue to license its pictures first run to the conventional theatres in downtown Allentown. Each of the branch managers gave his and his company's reasons for taking this position, and each of them stated that in making this determination he and his company acted independently of the action of any other distributor of motion pictures and without any knowledge of what any other distributor was going to do.

This testimony was augmented by a stipulation of counsel that if, in each instance, the highest official of the company having charge of the licensing of its motion pictures were called, he would testify that the reasons for the position taken by his company were substantially as stated by the company's branch manager, and that he had had no discussion, correspondence, agreement, or understanding with any representative of any other distributor as to the policy which would be pursued by his company or by any other distributor respecting the licensing—either on first run or subsequent run—of pictures to the respondents' new drive-in theatre in Allentown and, further, that to his knowledge no officer or employe of his company had any

such discussion, correspondence, agreement or understanding (see stipulations at R. 513-523).

Judge Kirkpatrick specifically declined to find that the reasons advanced by each of the companies for the refusal to license pictures to respondents' drive-in on a first-run basis were not valid reasons (R. 708, 715).

Although there was no evidence whatever to the contrary, and notwithstanding the stipulation by counsel, the trial judge summarily labeled the petitioners' testimony "incredible" (R. 711).

There was no evidence whatever that any distributor knew, prior to the commencement of the action in February, 1950, that any other distributor had received from the respondents a request for first-run pictures in the new drive-in theatre, and had denied or was going to deny any such requests.

Having reached the conclusion that all of the testimony of the distributors' witnesses relating to knowledge of the acts and policies of other distributors was unbelievable, the trial judge reached the further conclusion that each distributor was conscious of the parallel action of the others and that "conscious parellelism" was all the proof required to convict the distributors of a violation of the Sherman and Clayton Acts (R. 712).

He found (R. 681), pursuant to respondents' request, that there was an "agreement" between the distributors, but explained (R. 720) that the word was to be understood in light of the concept of agreement as developed by this Court in recent anti-trust cases, i.e., as Chief Judge Kirkpatrick viewed it, "conscious parallelism". (See again R. 712.)

Also, the trial judge in his opinion referred to a nation-wide policy on the part of the distributors to exclude drive-in theatres from first run (R. 714). This was a charge not mentioned in the complaint (R. 6) and was without a scintilla of evidence in the Record to support it. Actually, the trial judge had refused to permit evidence to be given regarding the runs accorded to drive-in theatres outside of

the Lehigh Valley (R. 38, 39, 46, 186, 359). Notwithstanding this ruling, some evidence did creep into the Record that certain drive-in theatres in other places had played feature pictures on first run (R. 88, 401-402, 447-487), which of course is diametrically opposite to the court's finding.

The Court of Appeals in a two to one decision (R. 738) sustained the trial judge, not on his theory that conscious parallelism was all the proof required to establish a violation, but rather on the ground that since the motion picture industry had been convicted and flayed by this Court in **United States v. Paramount Pictures, Inc.**, 334 U. S. 131 (1948), its officer and employe witnesses are unworthy of belief, and that there could not have been similarity of action without a conspiracy.

Neither the record nor the judgment in the **Paramount** Case was offered in evidence. Nevertheless, on the basis of the **Paramount** Case, this is what the majority of the Court of Appeals did:

1. It ascribed to the distributors the motive of protecting their theatre investments throughout the nation from drive-in competition. Not a word in the present Record supports this unfair statement. Three of the distributors—Columbia, Universal and United Artists—never owned any theatres. Divestiture consent decrees had been entered against RKO on November 8, 1948, and against Paramount on March 3, 1949; and prior to the end of 1949, when the respondents requested first runs for their drive-in, Paramount had actually divested itself of all its theatre interests. Final decrees against all the remaining distributors were entered February 8, 1950—two days before the instant suit was begun. These facts are not in evidence, but they would have been had there been any attempt by respondents to prove the "motive" which the majority of the Court of Appeals so improperly injected into the case.

2. It stated that the facts here "arose soon after the Paramount decision, and before any decree had been entered there against most of the distributor-defendants". This is completely erroneous.

3. It stated that there was no evidence "that this policy [the assumed nation-wide policy against drive-ins] was conceived subsequent to the time period in the Paramount case". As previously pointed out, the record of the **Paramount** Case was not introduced in evidence. There was no evidence of any "policy" on the part of the distributors as a group, and it was certainly not incumbent upon them to answer non-existent evidence.[1]

Judge Hastie took sharp issue with his colleagues—Judges Biggs and Staley—and filed a vigorous dissenting opinion (R. 750).

This is the second successive case in the Third Circuit which has been decided by the Court of Appeals on the ground that in view of the motion picture industry's "past proclivity to unlawful conduct", the officers and employes of these petitioners cannot be believed.[2]

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the final judgment here in question under Section 1254 (1) of the Judicial Code, 62 Stat. 928 (1948), 28 U. S. C. § 1254 (1).

Petitioners seek review of the judgment of the Court of Appeals of December 18, 1951.

STATUTES INVOLVED.

The statutes involved are the Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. §§ 1, 2) and the Clayton Act (Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. § 15).

---

1. The Court of Appeals reliance upon **United States v. Paramount**, 334 U. S. 131 (1948) was erroneous as a matter of law for the reasons set forth in the Petition for Rehearing (R. 775-780).

2. The other case is **Ball v. Paramount Pictures, Inc., et al.**, 169 F. 2d 317 (C. C. A. 3, 1948), cert. den. 339 U. S. 911 (1950).

QUESTIONS PRESENTED.

1. This Court having said in 1944 and again in 1948[3] that the industry of which the distributors are a part had "a proclivity to unlawful conduct", how long can that statement be permitted to prevent the distributors from receiving fair consideration in new matters not involved in the cases in which the statement was made?

2. May the statement of this Court growing out of an entirely different Record continue to be used as the basis for setting aside findings of a trial judge, or, as in this case, for totally disbelieving uncontradicted testimony of officers and employes of eight separate concerns in the industry?

3. Is a pattern of judicial conduct which denies to a certain class of litigants fair disposition of their cases something with which this Court should concern itself?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. In summarily holding that all of the uncontradicted evidence of officers and employes of each of eight distributors dealing with their knowledge of a certain subject was incredible, the District Court and the Court of Appeals departed so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. Unless this Court corrects the interpretation by the Court of Appeals of this Court's statement that the motion picture industry had "a proclivity to unlawful conduct", members of that industry will be completely at the mercy of adverse litigants. If their officers and employes are to be systematically disbelieved, even though uncontradicted,

3. United States v. Crescent Amusement Co., 323 U. S. 173, at 186 (1944); United States v. Paramount Pictures, 334 U. S. 131, at 147 (1948).

these litigants have no possible means of defending themselves in the voluminous litigation against them now pending in the Third Circuit.

3. The holding that each of the distributors, within a period of less than three months, during which respondents' drive-in theatre was necessarily closed (because of the winter season), must have known the decision which each of the other distributors had reached or was going to reach in response to a request for a first run of pictures during the next season without so much as a word of evidence that any of them knew that the others had received similar requests, and that this inferred knowledge, without more, is sufficient to convict the distributors of conspiracy, is so arbitrary that it should, we submit, shock the conscience of this Court.

4. If the decision of the Court of Appeals be regarded as an affirmance of the District Court's "conscious parallelism" theory, then there is a conflict between the Third Circuit and the Fourth Circuit, which, in **Windsor Theatre Company v. Walbrook Amusement Company, et al.**, 189 F. (2d) 797 (1951) affirmed the District Court of the District of Maryland in holding that "* * * similarity of action under substantially like circumstances affecting each distributor is not proof of conspiracy. * * *" (p. 799) and also between the Third Circuit and the Second Circuit which said in **Federal Broadcasting System, Inc. v. American Broadcasting Company**, 167 F. (2d) 349 (1948), cert. den. 335 U. S. 821 (1948), that "* * * We cannot say that such similarity results from anything more than common business solutions to identical problems in a competitive industry, * * *" (p. 352).

I.

Section 5 (b) of Rule 38 of the Rules of the Supreme Court specifies the following as one of the reasons which will move this Court to grant certiorari:

"Where a circuit court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

This subsection is preceded by the statement that:

"* * * The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered"

in granting writs of certiorari.[4]

Subsequent to this Court's decision in **United States v. Paramount Pictures, Inc., et al.**, 334 U. S. 131 (1948), two cases involving motion picture distributors have come before the Court of Appeals for the Third Circuit. The first was **Ball v. Paramount Pictures, Inc., et al.**, 169 F. (2d) 317 (1948), cert. den. 339 U. S. 911 (1950), decided a few months after this Court rendered its decision in **United States v. Paramount Pictures, Inc.**, and the second case was the present one.

In the **Ball** Case, the findings of fact made by the trial judge compelled a decision in favor of the distributor defendants. This was made clear in the opening paragraph of Judge Goodrich's dissenting opinion when he said (p. 321):

"The reason for this dissent is that the majority does not give the findings of fact made by the Trial Judge the effect which, it seems to me, Rule 52 requires. If those findings are accepted there is nothing

4. Another ground for the granting of a writ of certiorari is "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." This ground may be applicable in this case if, as pointed out at page 10, the decision of the Court of Appeals be regarded as an affirmance of the District Court's "conscious parallelism" theory.

to the plaintiff's case. I think on this point there is no dispute among the parties, their counsel, or the members of the Court."

However, the majority (Judges Biggs and McLaughlin) after stating that "Most of the present appellees are among the defendants in the Paramount litigation who are there characterized as having shown a 'proclivity to unlawful conduct' ", proceeded to ignore the trial judge's findings of fact and to make findings and inferences of their own on the basis of which they found a conspiracy.

The present case was decided on October 31, 1951. All of its facts arose after the closing of the record in the **Paramount** Case and presented a novel question for the consideration of the court, namely, whether the decision of any motion picture distributor is unreasonable who refuses to license pictures first-run to a drive-in theatre on the outskirts of Allentown, which has a bustling business and shopping district with an ample supply of independently operated, conventional first-run theatres.

Considering the facts previously stated, that the drive-in theatre is available only to those who attend it by automobile, that in the Allentown area it is open for only part of a year, that its performances are limited to evenings after dark and are seriously affected by unfavorable weather conditions, it would seem to any fair-minded person that a normal business executive, responsible for the first-run exhibition of motion pictures where they will gain the best reputation so as to enhance their subsequent-run income, would prefer first run in a conventional theatre in the heart of the business district of Allentown.

However, we take it that whether or not this decision be reasonable, any distributor of motion pictures is free to make it if it is made independently and without conspiracy, agreement or combination with any other distributor or exhibitor.

In the present case, the owners of the drive-in theatre made separate written demands for first-run product on November 29, 1949, and began suit on February 10, 1950, when their theatre was closed for the winter and not scheduled to reopen until about March 15, 1950.

There was no evidence whatever in the Record that any distributor knew that any other distributor had received a similar demand. The trial court found and the Court of Appeals affirmed the finding that the owners of the conventional theatres in Allentown and Bethlehem had been guilty of no unlawful conduct. Therefore, no distributor could have conspired with any of these exhibitors against the respondents' theatre.

As the respondents' theatre was closed during the entire period intervening between these demands for first run and suit the only way in which any of the distributors could have learned what any of the other distributors intended to do for the ensuing season was as a result of conversations or communications between them or as a result of conversations or communications between outside parties and the particular distributor.

The branch managers of each distributor as well as their respective superior officers who had the ultimate responsibility for determining policy in the distribution of pictures testified that there was no discussion, correspondence, agreement or understanding with the representatives of any other distributor on the subject. Each testified that his company had no knowledge of what any other company was going to do.

There was not one syllable of testimony contradicting this evidence.

And yet, the trial judge branded all of this testimony as "incredible". He held that each of the distributors must have known what the other distributors were doing,—although possibly this finding relates to the spring when the theatre was opened and after the complaint had been

filed. However, he refused to find that there was any "agreement" except in the sense that he believed he was required by the decisions of this Court and the Third Circuit to hold that if each distributor knew what the other one was doing and pursued the same course of action, there was a conspiracy. He rested his decision exclusively on "conscious parallelism", though he embroidered it by a non-existent "general program" of discriminating against drive-ins, concerning which he had refused to hear any testimony (Ante pp. 6, 7).

The Court of Appeals was unwilling to swallow the doctrine of "conscious parallelism" without more, but again called attention to the fact that the petitioners had been branded by this Court as having a "past proclivity to unlawful conduct" which the majority of the court believed had "some significance here where the conspiracy alleged by plaintiff is identical in scope and nature to one of the conspiracies found in the Paramount case—concerted action to fix a uniform system of runs and clearances".[5]

The court also found a similarity between the conspiracy "in the case at bar and the nation-wide conspiracy considered in the Paramount case", notwithstanding the fact, as we have previously pointed out, that the trial judge expressly rejected all evidence of any conspiracy extending beyond the Lehigh Valley area despite some evidence in the Record that some of the distributors had granted first run to drive-in theatres in certain other places (Ante p. 7).

Nothing that we can argue could possibly be as forceful as Judge Hastie's dissenting opinion (R. 750) in which

5. This is a misstatement of fact. There was no concerted action to fix a uniform system of runs and clearances in this case. The only similarity of action applying to all of the distributors was that none of them elected to license feature pictures on first run to respondents' theatre. Some of them offered respondents' theatre a second run with a 28-day clearance in favor of the downtown first-run theatres. Neither United Artists nor Columbia offered respondents' theatre a second run (R. 404, 425).

he dissects and exposes the errors of the majority and of the trial judge.

Particularly do we call attention to the concluding part of the dissenting opinion which deals with the reliance placed by the majority on the expression used in the Paramount litigation—"a proclivity to unlawful conduct".

Lest this Court think that our language has bordered on the extravagant, we quote Judge Hastie's next to last paragraph (R. 764):

> "My concern about this kind of proof is very great. If such matter is not needed to justify the finding of conspiracy here, I think it has no proper place in our analysis. If, on the other hand, the conclusion of the district court would be unreasonable without this make-weight we are approving a finding on a basis which runs counter to salutary notions of fairness deeply rooted in our jurisprudence. To imply new wrongdoing from past wrongdoing is in itself alien to our conception of fair trial. To do so without even the introduction of trial evidence and opportunity to rebut it is doubly wrong."

II.

In holding that "conscious parallelism" without more is sufficient to justify an inference of conspiracy in violation of the Sherman Act, the District Court read into the decisions of this Court something which cannot be fairly found in any of them.

And, stripping the decision of the Court of Appeals of its reliance on the distributors' "proclivity to unlawful conduct" there was nothing else in the case which could possibly warrant a finding against them.

If "conscious parallelism" alone will justify an inference of conspiracy, then these petitioners have no means of preventing repeated inferences of conspiracy (contrary

to the fact) unless they conspire to create a divergence of conduct in order to establish a defense.

Assume, *arguendo,* that every executive of a motion picture distributor would normally and without hesitation reach the conclusion that in an important trading area with a busy city like Allentown as the hub, the first run of his company's feature pictures would be more productive of subsequent-run business and therefore ultimately more profitable in a conventional, downtown, first-run theatre than in an outlying, drive-in theatre. How possibly could these eight petitioners avoid an inference of conspiracy unless they agreed among themselves that one or two of them should show their pictures first run in the drive-in theatre so as not to make possible a finding of "conscious parallelism"?

The mere fact that in order to get certain first-run pictures the drive-in theatre might offer a larger guaranteed rental than a conventional downtown theatre proves nothing at all.

Suppose a manufacturer of a new cosmetic wished to introduce it to the public and had a choice between a premier sale at a large, well established department store in New York City, where the new product would come before a buying public drawn from not only all of New York but from many points outside of New York, or at a fine, new, outlying store several miles from downtown New York. And suppose that the outlying store were to offer to pay both a higher price for the product and a premium for permission to be the first store to offer the product to the public. What would any intelligent cosmetic distributor decide to do? Obviously, he would choose the downtown department store.

And suppose further that each of eight manufacturers of cosmetic was ready simultaneously to place a new product on the market and had the same choice offered to it.

One of the manufacturers would be the first to choose. The other manufacturers might or might not learn that the first had made his choice. Quite irrespective of this knowl-

edge, the same compelling business considerations would undoubtedly cause the other manufacturers to make the same choice.

Is it the intendment of the Sherman Act that under the assumed facts some one or two or three of the manufacturers must introduce their products in the outlying store in order to avoid a charge of conspiracy in violation of the Sherman Act? To ask the question is to answer it.

The situation in the licensing of pictures first run in Allentown was different from our assumed facts relating to cosmetics only in that the eight distributors did not use the same first-run theatre in downtown Allentown to the exclusion of the others. There was real competition among the six downtown theatres in Allentown for the first-run product of the distributors (695a), but in all other respects the situation is substantially the same.

III.

This case has an importance which far transcends the particular decision.

Following this Court's decision in the **Paramount** Case, there has been a flood of litigation throughout the United States against the distributors, a proportionate share of which is pending in the Third Circuit.

As long as it is the law of the Third Circuit that "the past proclivity to unlawful conduct" must continue to be taken into consideration to the extent of branding as incredible all testimony of the distributors' officers and employes, and as long as a decision of the district court based upon "conscious parallelism" without more is allowed to stand in the Third Circuit to convict these petitioners of conspiracy they are at the mercy of the plaintiffs in the mass of litigation with which they are confronted there. The district courts must follow the law as laid down by the Court of Appeals, and that Court will follow the **Ball** Case and the present case.

Should this Court feel that there is no conflict between the Third Circuit and the Fourth and Second Circuits on the "conscious parallelism" theory, then must these petitioners wait to get relief from this Court until the court of appeals of some other circuit specifically rules that their "past proclivity to unlawful conduct" is not a substitute for proof in a new case?[6]

With great earnestness, we submit that until this Court reviews the theories upon which the Court of Appeals of the Third Circuit is deciding cases in which motion picture distributors are involved, they cannot obtain fair consideration in that Circuit. By fair consideration, we mean the consideration to which they are entitled under a proper interpretation of the Sherman Act and under a proper interpretation of the decisions of this Court.

Respectfully submitted,

WM. A. SCHNADER,
BERNARD G. SEGAL,
MORRIS WOLF,
ABRAHAM L. FREEDMAN,
Attorneys for Petitioners.

SCHNADER, HARRISON, SEGAL & LEWIS,
17th Floor, Packard Building,
Philadelphia 2, Pa.,
WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor, Packard Building,
Philadelphia 2, Pa.,
Of Counsel.

6. Although we have found no such specific ruling, the Court of Appeals of the Second Circuit in **Dipson Theatres, Inc. v. Buffalo Theatres, Inc.**, 190 F. (2d) 951 (C. C. A. 2, 1951), cert. den. 342 U. S. 926 (1952) affirmed the dismissal of an anti-trust action against the same motion picture distributors named as defendants in the present case, and Judge Augustus Hand stated at page 957: "* * * we have already had occasion to pass on the question of whether the Paramount case, supra, is conclusive of the question of conspiracy among the distributor defendants in a private treble damage action involving a single city. We answered in the negative * * *." Judge Hand then cited **Fifth & Walnut v. Loew's Incorporated**, 176 F. (2d) 587 (C. C. A. 2, 1949), cert. den. 338 U. S. 894 (1949).